

Dame Ellis Aylmer, - - - Appellant.

Robert Reed, Robert Dillon, John Donnellan, Jeffry Brown, Robert French, } Respondents.
and Sir Andrew Aylmer, - - - }

The Appellant's C A S E.

7th March,
1714.
Articles on the
Marriage of
the Appellant
with Luke
Dillon.

THE Appellant, in the Year 1714, being possessed of a very considerable Fortune, amongst other Things, of 2000 l. then in *South-Sea* Stock, which had thentofore been demitted to her by the Will of Captain *Philip Roch*, her then late Husband, deceased; and having contracted a Marriage with *Luke Dillon*, late of *Clonbrook* in the County of *Galway*, and Kingdom of *Ireland*, Esq; deceased, the Respondent *Robert Dillon*'s late Father; by which it was agreed, that the Appellant should reserve the said 2000 l. at that time in the *South-Sea* Stock, to her own separate Use, and in her own Power; and for that Purpose, previous to the Intermarriage, certain Articles bearing Date the 7th Day of *March* 1714, were executed between the said *Luke Dillon* of the first Part, the Appellant of the second Part, and *Mac Laughlin Donnellan*, Esq; deceased, of the third Part; whereby reciting, that a Marriage was shortly to be had and solemnized between the said *Luke Dillon* and the Appellant; and that it was agreed, that all the Plate, Jewels, and 2000 l. then in the *South-Sea* Stock, left to the Appellant by her then late Husband Captain *Philip Roch*, should be conveyed and made over, so as the sole Trust and Power thereof should remain in the Appellant, notwithstanding her Intermarriage with the said *Luke Dillon*: And that the said *Luke Dillon*, his Executors or Administrators, should not have any Right or Property therein; but that it should be lawful for the Appellant to dispose thereof, by Deed or Will, attested by three credible Witnesses; It was witnessed, That the Appellant, in Consideration of the said Marriage, and for the Uses aforesaid, and of twenty Shillings to her paid by the said *Mac Laughlin Donnellan*, did (with the Consent of the said *Luke Dillon*, testified by his being a Party thereto) grant, assign and make over the said Plate, Jewels, and 2000 l. to the said *Mac Laughlin Donnellan*, his Executors and Administrators, to the Use of the Appellant, so as the said *Luke Dillon* should, after the Intermarriage, have no Power thereof, but should be at the Disposal of the Appellant, as she should think proper, notwithstanding her Coverture: And that the said *Mac Laughlin Donnellan*, his Executors and Administrators, might receive the yearly Interest of the said 2000 l. for such Uses, and in such Manner, as the Appellant should from time to time, by Writing under her Hand attested, appoint.

15th March
1714.
Articles of
Agreement.

The said Marriage being solemnized, and the said *Luke Dillon* having contracted many large Debts, which made him uneasy; in order to enable him to discharge the same, the Appellant agreed to lend him the said 2000 l. without Interest, and the Principal to be repaid her by Instalments of 200 l. to be paid each Year, till the whole 2000 l. Principal was thereby paid. Accordingly the 2000 l. was paid him, and Articles of the 15th of *March* 1714, were executed between the said *Mac Laughlin Donnellan* of the one Part, and the said *Luke Dillon* and the Appellant of the other Part; whereby the said *Mac Laughlin Donnellan* did, with the Appellant's Consent, transfer and make over the said 2000 l. in the *South-Sea* Stock, together with the Interest thereon, due to the said *Luke Dillon*; to the end that the Debts, which affected the said *Luke Dillon*'s Estate, should therewith be discharged; and, in Consideration thereof, the said *Luke Dillon* covenanted with the said *Mac Laughlin Donnellan*, that he would by way of Mortgage, Rent-Charge, or otherwise, charge and incumber his real Estate in the Kingdom of *Ireland*, with the Sum of 200 l. per Annum, the same to continue till the said Sum of 2000 l. should be paid, without any Interest for the same, with Power, on Default of Payment, to distrain for the same; which Article was prepared by the said *Luke Dillon*, or his Council, and not so much as perused or seen by any Council for the Appellant, or any other Person skilled in the Law, on her Account; but being intended only as an Evidence of a general Agreement between the said *Luke Dillon*, and the Appellant and her Trustee, that the said *Luke Dillon* should give the Appellant some sufficient Security to repay the said 2000 l. at 200 l. per Annum, without Interest, and not as any Security itself, nor as an Agreement for any real or particular Security, but as an Agreement for his giving such Security as by Law the Appellant, and her Trustee, were capable of taking, and he of giving; in which Sense only the Appellant, and her said Trustee *Mac Laughlin Donnellan*, understood and signed the said Articles.

Statute Staple,
8th October
1715.

Defeazance,
8th October
1715.

The Appellant being a Papist, and her Husband *Luke Dillon* being indebted to her in this 2000 l. she was advised to take a Statute Staple, in the Name of a Trustee, as a Security for the Payment of it, by the same Instalments as were originally agreed upon. And accordingly the said *Luke Dillon* entered into a Statute Staple to the said *Mac Laughlin Donnellan*, as a Trustee for her in the Sum of 4000 l. before the Mayor and Constable of the Staple of *Galway*, in the said Kingdom of *Ireland*, bearing Date the 8th Day of *October* 1715.

And by way of Defeazance to the said Statute Staple, another Deed bearing even Date therewith, was entered into, and executed between the said *Mac Laughlin Donnellan* of the first Part, the said *Luke Dillon* of the second Part, and the Appellant of the third Part; whereby reciting, that the said *Luke Dillon* had received the said 2000 l. and for Security of the Repayment thereof, had entered into the Statute Staple above-mentioned, It was witnessed, That the said *Mac Laughlin Donnellan* did, with the Consent of the Appellant, covenant with the said *Luke Dillon*, that in case he the said *Mac Laughlin Donnellan* should be paid the Sum of 200 l. yearly, till thereby the said Sum of 2000 l. should be fully paid, that he should not sue out Execution on the said Statute Staple; but that the said Statute, on the full Payment of the said 2000 l. should be void; but in case of any Default of Payment of the 200 l. yearly, the said *Mac Laughlin Donnellan* should be at Liberty to proceed upon the said Statute Staple: And by the said Deed it was witnessed and agreed, that the several Securities for such Debts and Incumbrances of the said *Luke Dillon*'s, as should be paid off with the said 2000 l. should be assigned over to such Persons as the said *Mac Laughlin Donnellan* should appoint, as a farther Security for the said 2000 l.

13th March
1716.
Luke Dillon
died.

Luke Dillon departed this Life the 13th of *March* 1716, seized of an Estate of 1000 l. per Annum and upwards, leaving Issue the Respondent *Robert Dillon*, his eldest Son and Heir by a former Wife; and having duly made his last Will, appointed the said *Mac Laughlin Donnellan*, and the Respondent *Jeffry Brown*, Executors thereof, who took the Execution thereof upon them. *Mac Laughlin Donnellan* died some time in the Year 1726, having appointed *Peter Daly* and *Darcy Hamilton*, Esqs; his Executors;

Executors; who having renounced the same, Administration, with the Will annexed, was granted to *James Donnellan*, his second Son, who afterwards died, and of his last Will appointed the Respondent *John Donnellan* and *Robert French* Executors, who took the Execution thereof upon them.

Administration of the Goods and Effects of the said *Mac Laughlin Donnellan*, unadministered by *James Donnellan*, his Son, as far as related to the said Statute Staple, and the Money due thereon, was granted to the Respondent, Sir *Andrew Aylmer*, the Appellant's Brother, in Trust for the Appellant, the said *Luke Dillon*, in his Life-time; and the Respondent *Robert Dillon* his Son, since his Death, having respectively neglected to pay the said 2000 *l.* or any Part thereof; and the Appellant proceeding upon the said Statute, for the Recovery thereof; the Respondent *Robert Dillon*, knowing that the said *Mac Laughlin Donnellan*, and the Appellant, were respectively Papists; and having, by means of an Intimacy with the said *James* and *John Donnellan*, (in whose Hands the same respectively were) got the said Articles and Deeds above-mentioned delivered to him, in order to deprive the Appellant of the said 2000 *l.* and of the Benefit of the said Articles and Statute Staple, and to discharge himself of the said Statute Staple, and the 2000 *l.* thereon due, put up the Respondent *Robert Reed* (who had not long before been a Covenant Servant to the said *Robert Dillon*) as a Discoverer upon the Acts of Parliament made to prevent the Growth of Popery in Ireland, pretending that the said 2000 *l.* was a Charge upon Land, in favour of a Papist, and therefore forfeited by the said Acts.

26th July
1732,
Bill of Discovery.

Appellant's
Answer.

For which Purpose a Bill was exhibited in the High Court of Chancery in Ireland the 26th Day of July 1732, in the Name of the Respondent *Robert Reed*, though in Fact for the Benefit of the Respondent *Robert Dillon*, against the Appellant, and against the Respondent *Robert Dillon*, and the other Respondents *John* and *James Donnellan*, and *Jeffry Brown*, and by Amendment of the said Bill against the Respondents *Robert French* and Sir *Andrew Aylmer*; by which Bill, after having set forth the Marriage Articles, and the Articles of the 15th of March 1714, the said Statute Staple, and Deed of Defeazance, of even Date therewith, and the several Deaths and Representatives, and other Facts above-mentioned, it is charged that the said Statute Staple was only a collateral Security for making good the Rent-Charge of 200 *l. per Annum*, secured on the real Estate of the said *Luke Dillon*, by the Articles of the 15th of March 1714, and was entered into by the said *Luke Dillon*, in order only to elude the said Statutes made to prevent the Growth of Popery: And that the Appellant, in Trust for whom the said Statute Staple was entered into, being and always having been a Papist, and the Plaintiff a Protestant, the Plaintiff was by the said Acts intitled to the said 2000 *l.* and the Benefit of the said Statute Staple, as the first Protestant Discoverer; that the said Articles, Deeds, and Statute Staple, were respectively in the Appellant's Hands or Power; and that she had either destroyed or secreted them, in order to prevent a Discovery; that the said Statute Staple was a collateral Security only: And therefore prayed a Discovery; and that the Plaintiff might be decreed to the said 2000 *l.* and the Benefit of the said Articles, Statute Staple, and Securities respectively, as the first Protestant Discoverer, according to the Intent of the said Acts of Parliament. To which Bill the Appellant put in her Answer the 18th of February 1736, and also her further Answers to the amended Bills, the 4th of May, and 22d of November, 1736. And by the said Answers admitted the said Marriage Articles, the Articles of the 15th of March 1714, for the Security of the said 2000 *l.* and also the Statute Staple, and the Deed of Defeazance of even Date therewith, to be as above is stated: And that she, and her said Trustee *Mac Laughlin Donnellan*, were respectively Papists; but denied that the said *Luke Dillon* did at any time execute any Deed of Mortgage or Rent-Charge to her, or to any other Person in Trust for her, of any Part of his real Estate, for securing the Repayment of the said 2000 *l.* or of the said 200 *l. per Annum*, or any other Sum; and also denied, that she at any time consented or came to any Agreement, by which she was to take any Mortgage or Rent-Charge, for securing the Repayment of the said Money; or that any Security should be given contrary to the Popery Acts, or in any sort to elude them: But said, that her Agreement was, that such Security should be given as would make her safe, and such as she was capable of taking without Breach of any Law whatsoever; and that the said 2000 *l.* was by her lent and advanced to the said *Luke Dillon*, to relieve him from very great Difficulties, which he then lay under from his Creditors: And that she, in Consideration of his then Circumstances, consented to take the same by Instalments of 200 *l.* a Year, without Interest, which she understood was to be secured by a Judgment or Statute Staple; and that for securing the same, the Statute Staple before-mentioned was entered into; and that the same was an original Security for the said Money, and so meant and intended, but not as a collateral Security; and that if by any general Words, any Mortgage or Rent-Charge were to be made or granted for securing the Repayment of the said 2000 *l.* the same was done without any Agreement or Direction of the Appellant, for that or any such Purpose; and must, as she believed, have happened through the Mistake of the Persons employed by the said *Luke Dillon* to draw the said Articles, and without any Intention to elude the said Acts of Parliament.

And also denied, that any Security whatever, for any Debt or Debts of the said *Luke Dillon*, which had been paid off and discharged, had been at any time assigned to the Appellant, or the said *Mac Laughlin Donnellan*, or to any other Person whatever, for the Appellant's Use, or in Trust for her. And the other Defendants, to the said Bills respectively, having put in their Answers respectively, and Issue being joined, and several Witnesses examined, to prove the Plaintiff, in the said Cause a Protestant, and the Appellant and her said Trustee *Mac Laughlin Donnellan* Papists, and also to prove the Value of the said *Luke Dillon*'s Estate, at which time also the said Articles and Deeds were respectively produced, exhibited, and proved on the Part of the Plaintiff:

22d Decemb.
1738,
Cause heard.

On the 22d Day of December 1738, the said Cause came on to be heard before the then Lord High Chancellor of Ireland; when the said Marriage Articles of the 7th of March 1714, the other Articles of the 15th of March 1714, the Statute Staple and Deed of Defeazance of the 8th of October 1715, being of even Date with the Statute Staple, and the Appellant's Answer, being read, and some Depositions being also read to prove the Plaintiff a Protestant; and the Appellant and her said Trustee being then admitted both to be Papists, notwithstanding no Evidence was produced or read to prove that the said Statute Staple was or was intended to be a collateral Security to make good the Rent-Charge under the said Articles, nor any Security by way of Mortgage or Rent-Charge, or other Security whatsoever, for the said 2000 *l.* or for the Payments of the said yearly Sum of 200 *l.* then read or produced, excepting the said Statute Staple; nor any Evidence of, or Agreement for any Security for the same respectively read, excepting the said Statute Staple, the Articles of the 15th of March 1714, and the Deed of Defeazance of the 8th of October 1715; yet his Lordship was pleased then to declare, That the said Statute Staple was a collateral Security within the Meaning of the Acts

of

DECREE. of Parliament made to prevent the Growth of Popery in *Ireland*; and therefore at that time decreed the said Plaintiff the Benefit of the said Articles and Statute Staple, as a Protestant Discoverer upon the said Acts of Parliament.

REHEARING. And the Cause being afterwards re-heard before the said Lord Chancellor upon the Appellant's Petition, his Lordship, on the 30th of *May* 1739, was pleased to affirm the said Decree.

Which Decrees, the Appellant humbly conceives, are erroneous and unjust; and hath therefore appealed therefrom.

The Merits of this Case, it is apprehended, will depend upon the following Clauses, in an Act of Parliament in *Ireland*; which are therefore set forth *verbatim*.

" By the 8 *Anne*, c. 3. And whereas the said Act to prevent the further Growth of Popery, and several other Acts of Parliament, have been most notoriously eluded by several Papists, and others in Trust for them, who have purchased several Lands, Tenements and Hereditaments, and taken Leases, contrary to the true Intent and Meaning of the said Act, and have also taken collateral and other Securities by Mortgages, Judgments and Statutes, to cover, support, and secure such their Purchases and Leases; for Remedy whereof, and for the better enforcing the Execution of the said Acts, *Be it further Enacted and Declared*, by the Authority aforesaid, That all collateral and other Securities by Mortgages, Judgments, Statutes Merchant, or of the Staple, or otherwise howsoever, which have been made or entered into, or hereafter shall be made or entered into, to cover, support, secure, or make good any Bargain, Sale, Confirmation, Release, Feoffment, Lease, or other Conveyance, contrary to the said recited Act, shall be, and hereby are declared null and void, and of no Effect, to such Person or Persons so purchasing any of the said Lands or Tenements, in Trust for, or for the Benefit of any Papist, or Person professing the Popish Religion, as likewise to any such Papist or Person, his, her, or their Heirs and Assigns respectively: And that all such Lands, Tenements and Hereditaments, so conveyed or leased, or to be conveyed or leased to any Papist, or Person professing the Popish Religion, or to the Use of, or in Trust of any Papist, or Person professing the Popish Religion, contrary to the true Intent and Meaning of the said Acts, and all such collateral Securities as are or shall be made or entered into, to cover, support, secure, or make good the same, shall and may be sued for by any Protestant or Protestants, by his, or her, or their proper Action, real, personal, or mixed, founded on this Act, in any of her Majesty's Courts of Law, or in any Court of Equity, if the Nature of the Case shall require it; and the Plaintiff or Demandant in such Suit, upon Proof that such Purchase or Lease was made in Trust for any Papist, or Person professing the Popish Religion, or under any Confidence to or for any Papist, or such Person professing the Popish Religion, or for his, her, or their Benefit or Advantage, by receiving the Rents, Issues, or Profits thereof, or otherwise, shall obtain a Verdict and Judgment, or a Decree thereupon, and shall recover the same, and have Execution to be put into the Seisin and Possession thereof, to hold and enjoy such Lands, Tenements and Hereditaments, according to the Estate, Use, Trust, Interest or Confidence which such Papist, or Person professing the Popish Religion, had or should have had therein, had he, she, or they been qualified to purchase, hold, or enjoy the same; subject nevertheless to all such Rents, Covenants and Conditions, Reservations, and all Incumbrances and Portions whatsoever, as the same would have been subject to in the Hands of such Papist, or in the Hands of such Person to whom the same were sold or leased, in Trust for such Papist or Person professing the Popish Religion, or to his, her, or their Use, Benefit or Behoof; and shall also have the full Benefit of all such collateral Securities, as the Party or Parties to whom the same are or shall be made, might have had, if this, or the said former Act, to prevent the further Growth of Popery, had not been made.

" *Provided also*, and for the better Discovery of such Trusts for Papists, or Persons professing the Popish Religion, *Be it further Enacted*, by the Authority aforesaid, That it shall and may be lawful for any Protestant or Protestants to prefer one or more Bill or Bills in her Majesty's High Court of Chancery, or Chancery of the *Exchequer*, against any Person or Persons concerned in such Sale, Lease, Mortgage, or Incumbrance, and against all Persons privy to such Trust or Confidence for Papists, or Persons professing the Popish Religion as aforesaid, and to compel such Person or Persons to discover and direct such Trusts and Confidences, and to answer to all Matters and Circumstances relating thereunto, as by such Bill or Bills shall be required; to which Bill or Bills no Plea or Demurrer shall be allowed, but the Defendant shall answer the same at large, upon Oath; which Answer shall be good Evidence against the Defendant in Actions to be brought upon this Act, as in such Cases are usual; and that all Issues to be tried in any Action or Suit founded upon this Act, shall be tried by none but known Protestants."

It is insisted by the Respondent, that this Statute Staple is a collateral Security to make good a Rent-Charge of 200 *l.* to the Appellant, and therefore within the Intent of the first-mentioned Clause. But it is humbly apprehended there is no Ground for that Supposition, for the following, among other Reasons.

R E A S O N S.

- I. For that no Evidence whatever was given at the Hearing of the said Cause, that any Mortgage, Rent-Charge, or other Incumbrance whatever, on the real Estate of the said *Luke Dillon*, was ever given to the Appellant, or her said Trustee, for securing the said 2000 *l.* other than the said Statute Staple, nor of any Conveyance or Lease made of any Lands, Tenements or Hereditaments whatever for securing the same, which the said Statute Staple could be collateral to; and therefore the said Statute Staple was an original Security itself, made in pursuance of the said Articles of the 15th of *March* 1714, and not as a collateral Security entered into, to cover, support, or make good any other Security given for the same.
- II. For that the Articles of the 15th of *March* 1714 being no Security themselves, but only an Agreement for a Security, the said Statute Staple ought to be looked upon but as a Performance of the said Articles, as being a Security given, which does incumber the Estate of the said *Luke Dillon*, who entered into the same, the same being a Lien thereon at Law, and not any Security collateral to the said Articles, but an original Security in Performance thereof, and such as by Law the Appellant and her said Trustee were capable of taking.

For

III. For that the several Acts of Parliament, made to prevent the Growth of Popery in *Ireland*, being expressly provided merely to prevent the Lands of *Ireland* from coming into Papists Hands, either by Lease or Purchase; and lest in case of such Purchase or Lease, Papists, by taking personal Securities at the same time collateral thereto, may protect or make good such Leases and Purchases, all such collateral Securities are by the said Acts declared void as to the Papist, for whose Benefit the same are given, and also made recoverable by any Protestant who shall first discover the same: But that being only in case where a Purchase is made *by*, or a Lease or Conveyance of Lands is made *to* a Papist, or in Trust *for* one; and the Articles of the 15th of *March* 1714, being neither Lease, Bargain, Sale, or any Conveyance of any Lands, Tenements, or Hereditaments whatsoever, either to the Appellant, or any other in Trust for her, contrary to any of the said Popery Acts; the said Statute Staple can never be said to be any collateral Security, either within the Words or Meaning of the said Acts of Parliament; not being made to cover, protect, or make good any Purchase *by*, or Lease *to*, or in Trust *for* a Papist, there being no such Lease or Purchase to be made good thereby; and therefore neither void as to the Appellant, nor recoverable by a Protestant Discoverer, by any of the Words of the said Acts of Parliament respectively: And as it is not the Practice of Courts of Equity and Conscience, to extend or carry the Force of penal Statutes further than the natural and necessary Import of the Words themselves, it is apprehended, that instead of decreeing the said *Robert Reed* the Benefit of the said Statute Staple and Articles, his said Bill should have been dismissed with Costs.

For these, amongst many other Reasons, the Appellant humbly hopes, That the said Decrees shall be Reversed; and that the Respondent Robert Reed's Bill shall be absolutely Dismissed with Costs.

D. RYDER.
J. STRANGE.

Dame Ellis Aylmer, - - - Appellant.

*Robert Reed, Robert } - - Respondents.
Dillon, and others,*

The Appellant's CASE.

*To be Heard at the Bar of the House of
Lords, on the Day of
1740.*